Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

BRENDA A. GOWESKY, M.D.,

Petitioner,

v.

SINGING RIVER HOSPITAL SYSTEM, d/b/a OCEAN SPRINGS HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it "eminently reasonable", as a matter of federal law, to require an individual covered by the Americans with Disabilities Act to involuntarily disclose private medical information as a condition of employment when such information poses no significant health risks?

2. Does the Court of Appeals' decision that it was "eminently reasonable" to require the Petitioner to disclose private medical information as a condition of continued employment contravene clearly established and fundamental rights of privacy under the circumstances of this case, and, thus, constitute a discriminatory practice under the Americans with Disabilities Act?

3. Did the Petitioner raise a genuine issue of triable fact as to whether the Respondent engaged in a discriminatory practice under the Americans with Disabilities Act?

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PETITION FOR WRIT OF CERTIORARI

Brenda Gowesky, M.D. , respectfully submits this Petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court granting the Respondent's Motion for Summary Judgment (App. at 15a) is unreported. The opinion of the Court of Appeals (App. at 1a) is reported at 321 F.3d 503 (5th Cir. 2003).

JURISDICTION

The United States District Court for the Southern District of Mississippi granted the Respondent's Motion for Summary Judgment on March 12, 2002, and entered a Memorandum Opinion to that effect on the same date. (App. at 15a-33a). The Petitioner timely sought appellate review by filing a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its Opinion (App. at 1a-14a) affirming the District Court's action on February 6, 2003; no petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The Americans with Disabilities Act (ADA) provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

42 U.S.C. §12112(a).

STATEMENT OF THE CASE AND MATERIAL FACTS

Petitioner, Brenda Gowesky, M.D. (Gowesky), contracted the hepatitis C virus (HCV) while performing an emergency procedure on a moribund patient in the Respondent's emergency room facility. Gowesky was employed by the Respondent as an Emergency Room Physician. The contraction of HCV rendered Gowesky temporarily disabled from performing her job as an Emergency Room (E.R.) Physician, and this temporary disability lasted approximately two years while Gowesky underwent successful treatment for HCV. During this time Gowesky maintained her staff privileges with the Respondent and attended monthly

staff meetings of the Emergency Department. After her successful treatment, Gowesky was eager to return to work as an E.R. physician, and, following a staff meeting, Gowesky approached the Respondent's chief administrative Officer about her desire and plan to return to active work. This administrator expressed his fear of being treated by a healthcare worker infected with HCV.[1] The administrator imposed "return-to-work" conditions including a subsequently withdrawn demand that Gowesky submit to weekly blood testing; he required, however, that Gowesky attend a medical education "refresher" course and provide a full medical release from her physicians confirming her fitness to return to work. Gowesky complied with these conditions. The Respondent's medical director of the Emergency Department and Gowesky's immediate supervisor also imposed conditions on her return to work. The Emergency Department director "threatened her and told her that, if she returned to work, she would have to guarantee that there would be no problems, that she would be able to do the work fast, and that she would not be infectious. He further questioned Gowesky on whether she knew of any other emergency room physicians with hepatitis C." (App. at 3a). The Respondent's requirement that Gowesky "inform patients and hospital staff about her successful treatment for the virus" (App. at 10a) undergirds the first two questions for review.

It is important to emphasize that, based on the findings of the District Court, and Court of Appeals,

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[1] The administrator "said to me not only that he didn't think that I could work in the emergency room with hepatitis C, that he wouldn't go to a dentist with hepatitis C and he would not let me suture his child." (App. at 3a)

Gowesky's treatment for HCV had been "successful" and, at the time she expressed her desire to return to work, she was "virus-free" and posed no infectious risk to others. Thus, the Respondent's requirement that Gowesky disclose her prior medical condition to patients and hospital staff was not motivated by a medically plausible concern for the safety of the patients and staff; to the contrary, the Respondent's requirement was motivated by fear and ignorance of hepatitis C and prejudice toward people with this disease. In fact, the Court of Appeals' Opinion characterizes the disclosure condition as one "that she be able to reassure employees and patients of her continuing non-infectious status ." (App. at 10a).

The District Court's Opinion barely mentions the disclosure requirement, (App. at 20a), but still found it, on summary judgment, "not unreasonable". (App. at 28a). The Court of Appeals' Opinion affirmed that it was "eminently reasonable" to require Gowesky to involuntarily disclose her contraction and successful treatment of HCV. (App. at 10a). The Court of Appeals' Opinion did not rely on any medical evidence or empirical data to support its argument that Gowesky was a risk to patients or co-workers. The Court of Appeals simply concluded, as a matter of federal law, that the required disclosure was "eminently reasonable".[2] There was no discussion by either the District Court

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[2] The Court of Appeals questioned whether return-to-work conditions, even if unreasonable, could implicate a discrimination claim under the ADA. (App. at 10a-11a). It is respectfully submitted that the plain and unambiguous language of the statute states otherwise. "No covered entity shall discriminate...in regard to...other terms, *conditions* and privileges of employment." 42 U.S.C. §12112(a) (emphasis added).

or the Court of Appeals whether such a disclosure requirement complied with public health guidelines, comported with medical judgment or was otherwise justified by the record.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECIDED AN IMPORTANT ISSUE OF NATIONAL CONCERN THAT HAS YET TO BE ADDRESSED BY THIS COURT. FURTHERMORE, THE COURT OF APPEALS' DECISION CONCERNING THE RIGHTS OF EMPLOYEES WITH HEPATITIS C CONFLICTS WITH THE REASONABLE MEDICAL JUDGMENTS OF PUBLIC AND PRIVATE HEALTH EXPERTS INCLUDING THE CENTERS FOR DISEASE CONTROL (CDC), THE NATIONAL INSTITUTE OF HEALTH (NIH), THE AMERICAN MEDICAL ASSOCIATION (AMA), THE AMERICAN COLLEGE OF EMERGENCY PHYSICIANS (ACEP), THE SOCIETY FOR HEALTHCARE EPIDEMIOLOGY OF AMERICA (SHEA), AND THE AMERICAN COLLEGE OF SURGEONS.

The NIH has reported that "at least four million people in this country are believed to be infected with [HCV]" Management of Hepatitis C, NIH Consensus Statement, 2002. It is the leading cause of known liver disease and the most common reason for liver transplantation in the United States. The NIH projects that there will be a fourfold increase in chronic HCV

cases by the year 2015. In fact, the NIH believes HCV is the most prevalent blood-borne infection in the United States. *Id.* The National Institute for Occupational Safety and Health has observed that the healthcare sector of our economy employs over twelve million individuals and is the second fastest growing segment of the national economy. National Institute of Occupational Safety & Health, a Compendium of NIOSH Healthcare Worker Research. 2001 DHHS/NIOSH, Publication No. 2003-108. Based on 1997 data, an estimated seven million healthcare workers were exposed to HCV with more than 800,000 needle stick injuries a year.

The rights of healthcare workers, and their patients, with infectious diseases first became a subject of national discussion after the CDC reported six cases of possible transmission of human immunodeficiency virus (HIV) from a dentist to his patients. Possible Transmission of Human Immunodeficiency Virus to a Patient During an Invasive Dental Procedure. 39 Morbidity and Mortality Weekly Rep. No. RR-39 (1990). Then, in 1991, the CDC issued guidelines that addressed healthcare workers infected with blood borne pathogens, including HIV.[3] The 1991 guideline recommended that physicians and other healthcare workers infected with HIV "should not perform exposure-prone procedures unless they have sought counsel from an expert panel and notify prospective patients of the healthcare workers' seropositivity prior to undergoing an exposure-prone procedure."

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[3] Given the relative recent discovery of HCV, the CDC's 1991 guidelines did not address HCV. As will be discussed later, such guidelines have now been issued and conflict with the Court of Appeals' decision.

Recommendation for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures. 40 Morbidity and Mortality Weekly Rep. No. RR-8. By October 1991, the United States Congress enacted legislation that required states to adopt the CDC recommendations, or the equivalent, as a condition to receipt of receiving public health service funds. Public Health and Welfare Act, 42 U.S.C. §300ee-2 (1994). However, the disclosure requirements of the CDC guidelines apply only to patients of an infected healthcare worker that posed a direct risk of transmission by way of performing an invasive procedure. By its wording, the guidelines do not require the HIV-affected healthcare worker to advise all patients and co-workers of their medical status.

As noted earlier, HCV was not addressed in the 1991 guidelines. However, by 1998, the CDC concluded that HCV infected healthcare workers should *not* be restricted, either by expert review and/or disclosure, in their work.[4] In 1997, SHEA recommended that disclosure requirements, if any, be limited to those situations where the patient had been clearly exposed to the affected healthcare workers' infected blood or other

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[4] "There are no recommendations to restrict a healthcare worker who is infected with HCV. The risk of transmission from an infected healthcare worker to patient appears to be very low. As recommended for all healthcare workers, those who are HCV positive should follow strict aseptic technique and standard precautions, including appropriate use of hand washing, protective barriers, and care in the use of disposal of needles and other sharp instruments." Centers for Disease Control and Prevention, Recommendation for Prevention and Control of Hepatitis C Virus (HCV) Infection and HCV Related Chronic Disease. 47 Morbidity Weekly Rpt. No. RR-19 (October 16, 1998).

hazardous body fluid. Importantly, it was recommended that the healthcare workers should not be required to disclose their status to all patients. With regards to co-workers, SHEA recommended there was no need to know the infection status of co-workers. *Management of Healthcare Workers Infected with Hepatitis B Virus, Hepatitis C Virus, Human Immunodeficiency Virus or Other Blood Borne Pathogens*, Vol. 18, No. 5, Infection Control and Hospital Epidemiology (349, 358) (May 1997). In its position statement, the American College of Surgeons concluded that HCV infected surgeons would only be required to take special measures during the acute symptomatic phase of the illness. American College of Surgeons; Statement on the Surgeon and Hepatitis. *Bull Am. Col. Surg.* 1999; 84:21-24. There is no suggestion of the need for blanket disclosure to patients and co-workers. Similarly, the AMA does not recommend blanket disclosure.[5] The ACEP policy summary states that HIV positive healthcare workers should not be precluded from performing normal medical services where the performance of those services does not constitute a threat of harm to patients or others. ACEP Policy Statement; Bloodborne Infections in Emergency Medicine (October 2000). The worker is required to abide by rigorous infection control safeguards. No public health body or private organization recommends blanket disclosure.

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[5] "A physician who knows that he or she has an infectious disease, which if contracted by the patient would pose a significant risk to the patient, should not engage in any activity that creates a significant risk of transmission of that disease to the patient. The precautions taken to prevent the transmission of a contagious disease to a patient should be appropriate to the seriousness of the disease and must be particularly stringent in the case of a disease that is potentially fatal. AMA Guideline E-9.13, Physicians and Infectious Diseases. (June 1999).

In effect, the Court of Appeals' decision approved such an expansive requirement. It did so even though the affected healthcare worker, here the Petitioner, was non-infectious and posed no significant health risk. It did so without reliance on or reference to any medical findings or data and without consulting the informed judgments of public health officials. Had it done so, the Court of Appeals would have concluded that it was not eminently reasonable to require the petitioner to disclose personal and private medical information about her prior status as HCV infected, her successful treatment and her current non-infectious status. In light of informed medical judgments, such a condition is patently unreasonable and results in a discriminatory practice under the ADA.

In light of the medical judgments of the CDC and other respected health related organizations, public and private, the Court of Appeals' decision represents a substantial departure from accepted medical judgment on an important question of federal law, which has not been, but should be, settled by this Court. Unless corrected, countless individuals, particularly healthcare workers, could be required to involuntarily disclose personal and private medical information even though that information has not been shown to pose a significant health risk to anyone other than, perhaps, the affected individual. The policy implications cannot be understated. If allowed to stand, the Court of Appeals' decision results in precedent, at least in the Fifth Circuit, that an employer, covered by the ADA, can demand, as a condition of employment or continued employment, that an individual disclose private information about a medical condition that has not been shown to pose a significant health risk to others.

II. THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *SCHOOL BOARD OF NASSAU COUNTY, FLORIDA V. ARLINE*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1986) AND *BRAGDON V. ABBOTT*, 524 U.S. 624, 118 S.Ct.2196, 141 L.Ed.2d 540 (1998).

This Court's decision in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1986), addressed whether an individual with a contagious disease could qualify as a handicapped person within the meaning of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. In *Arline*, the contagious disease was tuberculosis, and the Court held "that a person suffering from the contagious disease of tuberculosis can be a handicapped person..." 480 U.S. at 289, 107 S.Ct. at 1132. In reaching this conclusion, the Court made the following comments which are particularly instructive.

> Society'[s] accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such non-infectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.

Id.. at 284, 107 S.Ct. at 1129 (footnotes omitted).

Moreover,

> the isolation of the chronically ill and those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness. Tuberculosis is no exception.

Id. at 284n.12, 107 S.Ct. at 1129n.12.

It is submitted that HCV is also no exception to society's unfounded fears.

The *Arline* court went on to note that, if the Rehabilitation Act was to achieve its goal of protecting individuals from discrimination based on stereotypes or unfounded fears of a contagious disease, then any impairment on the afflicted person's employment rights would have to be based on individualized findings of fact supported by reasonable medical judgment on the nature of the disease and risk, the duration of the risk, the severity of the risk and the probability that the contagious disease will be transmitted. 480 U.S. at 288, 107 S.Ct. at 1131. It is particularly noteworthy that the Court patterned the inquiry to guidelines suggested by the AMA and further suggested to courts that, in the context of a contagious disease, deference should be made to the reasonable medical judgment of public health officials. *Id.*

More recently, in *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct.2196, 141 L.Ed.2d 540 (1998), this Court again addressed an individual's rights when that individual has a contagious disease. In *Bragdon* the

contagious disease was asymptomatic HIV, and the Court held that such a condition was a disability under the ADA. The petitioner in *Bragdon* was a dentist who had refused to treat the HIV-individual in his office. The patient sued the dentist under the ADA, and the district court granted summary judgment which was affirmed by the First Circuit Court of Appeals. The Court's holding in *Bragdon* was limited to whether HIV infection was a disability under the ADA even if asymptomatic. However, with regard to whether the dentist could have refused to treat the patient because her infectious condition posed a significant health risk, the case was remanded for further development of the record with a reminder that the determination of whether a significant health risk exists must be based on medical or other objective evidence. *Id.* at 649, 118 S.Ct. at 2210. *Bragdon* teaches that the reasonableness of actions taken against those who suffer contagious diseases must be made objectively and in light of available medical evidence. Specifically, these actions should not be based "only on a good faith belief that a significant risk exists.". 524 U.S. at 650, 118 S.Ct. at 2211. As in *Arline*, the reasonableness of an action must be assessed in light of the views of public health authority, including the CDC and NIH. These views are to be given "special weight and authority". *Id.* No court has ever held, until the Fifth Circuit rendered its decision in this case, that a non-infectious healthcare worker would be required to disclose private and personal medical information as a condition of employment. [6] In other words, the Fifth

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[6] Since this Court's decision in *Arline* numerous courts have addressed employer restrictions on HIV infected healthcare workers under the Rehabilitation Act or the ADA. In some cases, the restrictions included requiring the affected healthcare worker to obtain informed consent from the patient by disclosing the HIV status. The most extensive analysis of the disclosure requirement is

Circuit's decision is contrary to the CDC's recommendation that HCV affected healthcare workers should have no restrictions placed on their employment.

That the Court of Appeals' Opinion conflicts with *Arline* and *Bragdon* should be clear. First, the Respondent's requirement that Gowesky inform patients and co-workers of her HCV status is not supported by

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found in the New Jersey decision of *Estate of Behringer v. Medical Center at Princeton*, 249 N.J. Super. 597, 592 A.2d 1251 (1991).In upholding the requirement that the HIV positive surgeon advise his patients of his AIDS status, the court reasoned that since the near certain result of death would follow the transmission of HIV from surgeon to patient, even if the risk of transmission was statistically low, was so severe as to outweigh any right of the physician to keep the information private. Federal courts that have addressed restrictions placed on healthcare professionals infected with HIV have reached similar conclusions and upheld as non-discriminatory restrictions or impairments on employment. *See, e.g., Doe v. University of Maryland*, 50 F.3d 1261 (4th Cir. 1995) (neurosurgical resident barred from practice in light of risk to patients); *Bradley v. University of Texas M.D. Anderson Cancer Center*, 3 F.3d 922 (5th Cir. 1993), *cert. denied*, 510 U.S. 1119, 114 S.Ct. 1071, 127 L.Ed.2d 389 (1994) (HIV positive surgical technician posed a risk of "catastrophic consequences," and was not "otherwise qualified" to continue employment); *Leckelt v. Board of Commissioners of Hospital*, 909 F.2d 820 (5th Cir. 1990) (nurse properly discharged by hospital after refusing to disclose HIV test results); *Estate of Mauro v. Borgess Medical Center*, 137 F.3d 398 (6th Cir. 1996) (surgical technician properly laid off after a hospital determined he was infected with HIV); *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (significant risk of HIV transmission justified segregation of prison inmates based on their HIV positive status); *Scoles v. Mercy Hospital Corp.*, 887 F. Supp. 765 (Ed. Pa. 1994) (orthopaedic surgeon's HIV positive status justified hospital requirement of disclosure and did not violate ADA); *Doe v. Washington University*, 78 F. Supp. 628 (Ed. Mo. 1991) (HIV positive dental student did not have protection of Rehabilitation Act after being dismissed from dental school based on his HIV status).

any evidence that she posed a significant health risk. On the contrary, the disclosure requirement was based not on a documented safety risk, but the fear (unfounded by CDC) of a safety risk. Conditioning Gowesky's employment on her involuntarily disclosing private information impaired and restricted her employment rights under the ADA. The condition unreasonably forced Gowesky to choose between her livelihood or her privacy.[7] This is in direct conflict with this Court's decision in *Arline* and *Bragdon* that before the rights of a contagious person may be impaired, whether in the employment arena or the services arena, such an impairment must be supported by objective

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[7] Gowesky's right to privacy, as well as countless others, is clearly implicated by the disclosure requirement. The right to privacy is a fundamental right. *See, Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). In order to intrude on this right, the Constitution requires a compelling reason to do so. *Id.* In this case, absent a showing of a "significant health risk," such a reason is severely lacking. *See Glover v. ENCORE*, 867 F.2d 461 (8th Cir. 1988) (enjoining employer's policy that employees submit to HIV testing where risk of disease transmission, under circumstances, minuscule). That an individual's medical condition is a private and not public matter should be unquestioned. From a federal standpoint, medical information has always been exempt, absent compelling circumstances, from disclosure under the Freedom of Information Act. 5 U.S.C. §522(b)(6) (exempting "medical files ..the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.") More recently, the first-ever federal privacy standards to protect an individual's medical records were adopted pursuant to the Health Insurance Portability and Accountability Act of 1996. See 45 C.F.R. subpart 160. . These standards represent a uniform, federal floor of privacy protection for individuals. Gowesky's fundamental right to privacy is also protected by the Mississippi Constitution, the state of Petitioner's residency. Article III, §32 of the Mississippi Constitution; *See also, Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653 (1998).

medical evidence. The comments and conduct of the Respondent's supervisors highlight that society's unfounded fears of contagious diseases still invade the workplace and result in prohibited discriminatory practices.[8]

III. THE OPINIONS BELOW CONFLICT WITH THIS COURT'S INSTRUCTIONS ON THE EVIDENTIARY BURDENS IMPOSED BY AND THE PROCEDURAL SAFEGUARDS EMBODIED IN RULE 56, F.R.Civ.P

This Court has noted, even while recognizing the utility of summary judgment procedure, that "Rule 56 must be construed with due regard...for the rights of persons asserting claims...that are adequately based in fact to have those claims...tried to a jury..." *Celotex Corp. v. Catrett*, 477 U.S. _317, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). In this context, the reviewing court must review the record as a whole. *Matsushita Elec.*

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[8] The Court of Appeals' Opinion recognized that the supervisors' remarks were "uninformed". The record contains the depositions of the supervisors wherein they testified, among other things, that neither was aware of any guidelines governing HCV and both professed to know little about the virus. The medical director "testified that he was not aware of any hospital guidelines regarding a physician working with an infectious disease. He admitted having limited knowledge of hepatitis C and was unaware of the need to require weekly blood tests to allow Gowesky to perform as an emergency room physician." (App. at 18a). The chief administrative officer "stated he had no experience with hepatitis C and was unaware of any guidelines regarding the return of an employee who had been gone from work because of illness." (App. at 18a). At oral argument, Circuit Judge Jones, the author of the panel Opinion, disclosed that she had personal experience with HCV since her husband had been infected by the virus.

Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In this review, the Court must draw all reasonable inferences in favor of the non-moving party, and refrain from making credibility determinations since such determinations are the functions of juries and not judges. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). *See also, Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 120 S.Ct. 2097, 146 L.Ed.2d 105 (2000). Moreover, in employment discrimination cases, this Court has recognized that "[w]orkplace conduct is not measured in isolation." *Clarke County School District v. Breeden*, 532 U.S. 268, 270, 121 S.Ct. 1508, 1510. All circumstances in the record must be considered and considered in the light most favorable to the non-moving party, here Petitioner. *Id.* Since employment discrimination cases "necessarily involve examining motive and intent," granting summary judgments in such cases is "especially questionable". *Hayden v. First National Bank of Mt. Pleasant, Texas*, 595 F.2d 994, 997 (5th Cir. 1979). Unless it is clear that a trial is unnecessary, summary judgment should not be granted. *Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S.Ct. at 2513. Of course, the burden is on the moving party to make this showing.

Despite clear guiding principles, the courts below decided Gowesky's claims on summary judgment in the face of conflicting evidence and inferences. The motives and intent of the Respondent's agents are in question: Did its agents act out of fear, ignorance, prejudice, in bad or good faith, when they imposed restrictive conditions on Gowesky's return to employment? Did the Respondent's agents regard the Petitioner as disabled? Were the conditions and restrictions on employment indicative of the

Respondent's perception of the Petitioner as being disabled? And, were the conditions and restrictions the product of pretext and prejudice or reasonable in light of the circumstances? These legitimate and material questions remain in dispute and must be answered. Indeed, these are questions for a jury to consider. But, instead of Gowesky being afforded her right to trial by jury, the District Court and Court of Appeals answered them in favor of the Respondent's position, albeit for different and inconsistent reasons. In doing so, both courts deviated from this Court's admonitions.

The most glaring deviations can be illustrated in how the courts below "found" facts that are inaccurate and even inconsistent with other established facts. For example, in summarily dismissing Gowesky's claim that the Respondent perceived her as disabled, the Court of Appeals characterized the comments that only "question[ed] her fitness to practice emergency room medicine, a professional calling in which routine exposure to blood and bodily fluids might allow the hepatitis C virus to spread." (App. at 7a). However, there was no "virus to spread". Both courts below acknowledged that, at the time Gowesky sought to return to work, she was non-infectious and virus-free as a result of successful treatment. (App. at 19a). There is no objective evidence in the record to even suggest that Gowesky was unable to work in an exposing environment; all the evidence suggested she was. Thus, when the Court of Appeals concluded that "[t]he conditions that Rimes and Weldon placed on Gowesky were, *given the nature of Gowesky's work*, eminently reasonable," (App. at 10a) (emphasis added), it failed to consider, given the nature of Gowesky's status, *i.e.*, non-infectious, whether any condition was reasonable. The Court of Appeals' logic is flawed, internally inconsistent

and, certainly does not comport with the stringent requirement of Rule 56. Since Gowesky was virus-free and non-infectious, the nature of her work is irrelevant. This is especially true in light of the public health guidelines that impose no restrictions or conditions on an HCV affected healthcare worker. No objective medical judgment supported the Respondent's conditions imposed on Gowesky, much less suggested that they were reasonable; the conditions, particularly disclosure, were born of ignorance and fear. In effect, the disclosure condition required Gowesky to needlessly tell patients and co-workers, "Don't fear me; I'm not a risk to you." To decide on summary judgment that such workplace conduct by an employer is eminently reasonable cannot stand. It is clear that the courts below engaged in fact-finding and made credibility determinations that they were prohibited from doing in a Rule 56 proceeding.

Another example of the inaccuracies and inconsistencies of the courts below can be found by comparing the two courts' discussions of the Respondent's argument that it was Gowesky who failed to return to work. The Court of Appeals relies heavily on Gowesky's purported "repeated failures to return to work" (App. at 12a) as a basis for concluding that the Respondent did not perceive her as disabled.[9] With regard to the first occasion, the Court of Appeals references "last-minute telephone calls" (App. at 13a), but ignores the record evidence identified by the District

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[9] The Court of Appeals' reference to "at least two occasions" (App. at 12a) is unsupported by the record. A review of the District Court's opinion and the record makes it clear there were *only* two occasions. Even with just two occasions, both courts described the occasions differently.

Court that the Respondent was given more advanced notice of the Petitioner's need for surgery and a resulting absence from work (App. at 17a). The District Court, though, inaccurately described the first occasion as being because "Gowesky postponed that decision [to return to work] for unrelated surgeries." (App. at 29a). Furthermore, one day following Gowesky's surgery, the medical director informed her that she would be indefinitely removed from the work schedule. With respect to the second occasion that Gowesky allegedly failed to return to work, the District Court erroneously noted that "she was unable to work at that time, due to a reactivation of the hepatitis C virus." (App. at 18a).[10] The Court of Appeals fails to discuss the circumstances surrounding the "attorney-drafted correspondence". (App. at 12a). This correspondence along with Dr. Gowesky's explanation in the record makes it is apparent that both courts engaged in impermissible fact-finding.[11]

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[10] Gowesky did not experience a reactivation of her hepatitis C infection; the blood test was falsely positive.

[11] Totally glossed over by both courts was the fact that by the summer of 1999 fears and conduct of the administrator and medical director precipitated the need for Gowesky to seek psychotherapy. Equally ignored by both courts were Gowesky's handwritten notes and taped telephone conversations between Gowesky and the hospital administrator and medical director; these clearly document ongoing demands and negative comments made by the Respondent over a four-month period. Neither court commented on these facts and simply chose to ignore them. When a taped telephone conversation confirmed that the administrator did indeed say that he would not allow a dentist with hepatitis C to provide him with dental care, and he would not allow Gowesky to suture his child's wound, the Respondent's defense reverted from denying the comments were made to simply describing them as stray remarks; both courts accepted this defense without further scrutiny. Also, both courts failed to consider Gowesky's notes or

CONCLUSION

Whether it is the isolation of those with leprosy, the termination of a teacher with tuberculosis, or the refusal to treat dental patients with HIV, society's prejudices and fears of contagious diseases do indeed span the centuries and the continents. No legal or medical guidelines exist that mandate a healthcare worker who has been successfully treated for HCV be subjected to professional restrictions or be required to disclose his or her health history or non-infectious status. Unless the writ is granted in this case, and the decision below vacated, there will exist a legal guideline that conflicts with informed medical judgment. For this and all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Gowesky's psychiatrist or psychologist's opinions as additional sources of evidence.

(Any footnotes trail the end of each document.)
No. 02-60283

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRENDA A. GOWESKY, M.D.,
Plaintiff-Appellant,

versus

SINGING RIVER HOSPITAL SYSTEM, d/b/a OCEAN SPRINGS HOSPITAL,
Defendant-Appellee.

February 6, 2003, Decided
February 6, 2003, Filed

COUNSEL: For BRENDA A GOWESKY, Plaintiff - Appellant: Robert H Tyler, Law Office of Robert H Tyler, Biloxi, MS.

For SINGING RIVER HOSPITAL SYSTEMS, Defendant - Appellee: Karl R Steinberger, Kevin Clyde Bradley, Colingo, Williams, Heidelberg, Steinberger & McElhaney, Pascogoula, MS.

JUDGES: Before GARWOOD, JONES, and STEWART, Circuit Judges.

OPINION BY: EDITH H. JONES
OPINION: EDITH H. JONES, Circuit Judge:

This is an appeal from the district court's grant of summary judgment to defendant Singing River Hospital Systems ("Singing River") on plaintiff Brenda A. Gowesky's ("Gowesky") ADA claims for disability-based

workplace harassment and employment discrimination. 42 U.S.C. § 12112 (a); see also Flowers v. S. Reg'l Physician Servs., 247 F.3d 229 (5th Cir. 2001). Gowesky has not created a material fact issue concerning whether she was "regarded as disabled" by her employer after undergoing successful treatment for hepatitis C infection; nor has she surmounted the evidentiary burden concerning disability-based harassment or an adverse employment decision. We affirm the summary judgment.

I. FACTS

On February 26, 1997, while attending a patient in the emergency room of Ocean Springs Hospital (owned by Singing River), Gowesky was accidentally exposed to the hepatitis C. virus. On March 20, she informed Dwight Rimes, Administrator of the Ocean Springs Hospital, that she had tested positive. She ceased active work at the hospital several days later (March 26), but maintained staff privileges and continued to attend monthly staff meetings. This practice persisted for the next two years, even as she underwent chemotherapeutic treatment for her infection.

On February 8, 1999, following one of these meetings, Gowesky informed Rimes that the virus had gone into remission and that she wanted to return to work at the end of May, following her upcoming carpal tunnel surgeries. Gowesky testified in deposition that

Mr. Rimes told me that he wasn't sure that I could work in the Emergency Department with this hepatitis C, that he was going to the hospital attorneys to find out if I could work and he said I would have to do some refresher courses, that I would have to get clearance from physicians, and he wanted clearance from Dr.

Schiff because the local physician wasn't [acceptable]. I had to make sure that I wasn't having any more problems with my hands; I'd have to have weekly blood draws.

Gowesky further asserts that Rimes "said to me not only that he didn't think that I could work in the Emergency Room with hepatitis C, that he wouldn't go to a dentist with hepatitis C and he would not let me suture his child."

At this time, she also spoke with Dr. John Weldon, Director of Emergency Medicine at Ocean Springs Hospital and her immediate supervisor, who, she alleges, threatened her and told her that, if she returned to work, she would have to guarantee that there would be no problems, that she would be able to do the work, and that she would not be infectious. He further questioned Gowesky on whether she knew of any other emergency room physicians with hepatitis C.

At a staff meeting on March 22, Weldon gave Gowesky a copy of the emergency room staffing schedule for the months of June, July, and August; she was slated to return to work on June 1.

Between this meeting and her scheduled return date, Gowesky underwent her two surgeries (March 23 and April 19) and reaffirmed her commitment to resume her duties. In a letter dated March 26, Gowesky told Rimes that she would indeed attend a refresher class and provide a letter from her physician confirming her ability to resume work.

In the meantime, Singing River had been engaged in corporate restructuring. One feature of the plan involved the transfer of emergency room staffing

responsibilities from Singing River Hospital Systems to the Emergency Room Group, Ltd. ("ERG"). September 1 was the anticipated transfer date. On or about May 31, Singing River gave each of the emergency room physicians in its employ at Ocean Springs a formal 60-day termination notice. As with other emergency room physicians, Gowesky received this release from Singing River and a promise of future employment from ERG.

Gowesky's receipt of this notice appears to have marked a low point in her relationship with Rimes and Weldon. In February, she was surprised by their imposition of conditions upon her return and offended by their comments; over the following four months she claims to have engaged in numerous other conversations in which they made other offensive remarks; and in May she thought they fired her. Upset by this apparent indignity, she telephoned Rimes to tell him that she objected to her dismissal. (Her suspicion was, however, unfounded.) She did not report to work on June 1. A letter from her attorney followed on July 29, in which he stated that Gowesky would not return to work, as re-scheduled, on August 1.

Contrary to Singing River's expectations, the corporate restructuring was still in limbo when the emergency room staffing contracts expired at the end of August. For the entire month of September, Ocean Springs Hospital's emergency room physicians worked without contract. At the start of October, however, when it appeared that the transition was not imminent, Ocean Springs Hospital offered all of its emergency room physicians interim contracts. Upon consummation of the corporate transition in February 2000, these physicians received permanent contracts from ERG. Gowesky did not enter into either contract.

Gowesky filed her complaint against Singing River on June 9, 2000, alleging gender- and disability-based discrimination. The district court granted Singing River's motion for summary judgment on March 14, 2002. Gowesky now appeals only the district court's disposal of her ADA claims.

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, applying the same standard as the district court. See Walker v. Thompson, 214 F.3d 615, 624 (5th Cir. 2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). "If the moving party meets the initial burden of showing there is no genuine issue of material fact, the burden shifts to the non moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000) (internal quotations and citation omitted). Doubts are to be resolved in favor of the nonmoving party, and any reasonable inferences are to be drawn in favor of that party. See Burch v. City of Nacogdoches, 174 F.3d 615, 619 (5th Cir. 1999).

Evans v. City of Bishop, 238 F.3d 586, 588-89 (5th Cir. 2000)

III. DISCUSSION

Gowesky brings two claims to the court. She alleges that

she was the victim of disability-based (1) workplace harassment and (2) employment discrimination. A common element to both claims is that the plaintiff be "disabled." Before addressing her claims individually, this court will consider this threshold requirement to both.

A. Gowesky Was Not "Regarded as Disabled"

Gowesky does not assert that, as a result of her hepatitis C infection, she was disabled, in a conventional sense, under the ADA. As defined by the Act, a "disability" is a "physical or mental impairment that substantially limits one or more . . . major life activities." Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2)(A). The ability to engage in gainful employment is one such activity. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(i).

The ADA's definition of "disability" does, however, permit suits by plaintiffs who, though not actually disabled per § 12102(2) (A), are nonetheless "regarded as having such an impairment." 42 U.S.C. § 12102 (2) (C). This court, citing the applicable regulations, has set out the manner in which one might establish such a claim:

One is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of others toward such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantially limiting impairment.

Bridges v. City of Bossier, 92 F.3d 329, 332 (5th Cir. 1996).

Gowesky alleges that, though not disabled under subsection (A), she was "regarded as disabled" by her supervisors under subsection (C). This is evidenced, she argues, by their questions and remarks regarding her ability to return to work in the emergency room.

With her assertion this court cannot agree. At most, the comments cited by Gowesky question her fitness to practice emergency room medicine, a professional calling in which routine exposure to blood and bodily fluids might allow the hepatitis C virus to spread. The supervisors' remarks, no matter how uninformed, do not suggest Gowesky was otherwise unable to work as a doctor in a less-exposed or -exposing environment. The EEOC regulations make plain that an inability to perform one particular job, as opposed to a broad range of jobs, does not constitute an impairment that substantially limits one's ability to work. 29 C.F.R. § 1630.2(j)(3)(i) . This court has enforced the regulatory distinction. See Bridges, 92 F.3d at 332 & n.3; Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726-28 (5th Cir. 1995).

Equally detrimental to her claim is the hospital's point that Gowesky could not have been regarded as disabled by the supervisors because they kept reassigning her to the emergency room schedule. It was Gowesky who repeatedly declined to return to work. She cannot succeed on the "regarded as disabled" element of either claim when her employer never limited her job duties or hindered her return to the full range of duties.

On the basis of this conclusion alone, this court concludes that Gowesky's two claims must fail. For the purposes of a complete analysis, however, we will

consider other elements of her two claims, assuming for the sake of argument that Gowesky could have been "regarded as disabled" by Weldon and Rimes.

B. Disability-Based Harassment Claim

In 2001, this court recognized a cause of action for disability-based workplace harassment under the ADA, modeling it after a similar claim under Title VII. Flowers, 247 F.3d 229. To succeed on this claim, a plaintiff must demonstrate

> 1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities: (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action.

Id. at 235-36.

The legal standard for workplace harassment in this circuit is, as Gowesky acknowledges, high. For workplace abuse to rise to the level of an actionable offense the "disability-based harassment must be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment." Flowers, 247 F.3d at 236 (citations omitted).

In support of her claim that she suffered disability-based harassment, Gowesky cites, but does not discuss, two cases in which this court considered such claims. The first of these is McConathy v. Dr. Pepper/Seven-Up Corp., 131 F.3d 558, 564 (5th Cir. 1998). In this case we

considered whether an employer's boorish comments toward an employee regarding the slow pace of the employee's recovery from her temporomandibular joint disease, n1 his reassignment of work away from her, and his insensitivity toward her need for surgery and time to recuperate would constitute "sufficiently pervasive disability-based harassment," id. at 563, if such an action existed. This court declined to hold that the ADA authorizes a discrimination-based workplace harassment claim, but concluded that, even if the ADA did authorize such an action, the employer's behavior "would not be sufficient as a matter of law to state a claim of hostile environment harassment." Id. at 564. "It is a simple fact that in the workplace, some workers will not get along with one another, and this Court will not elevate a few harsh words or 'cold shouldering' to the level of actionable offense." Id.

The second case, decided last year, presents an employer who radically changed the conditions of its employee's working conditions when it discovered that she had contracted HIV. Flowers, 247 F.3d 229. The employee's immediate supervisor -- who had been close friends with her -- ceased socializing with the employee, intercepted her telephone calls, and eavesdropped on her conversations. The company's president "became very distant" even though "they used to get along very well": He "refused to shake Flowers's hand and would go to great pains to circumvent her office to get to other parts" of the workplace. Id. at 236-37. In addition, Flowers, who had received outstanding work performance assessments, was "written up" twice and placed on ninety-day probation. Id. at 237. When the first probationary period expired, another one was imposed at a meeting in which the president uttered vulgar sexual accusations. Finally, Flowers was fired. This court concluded, first, that the ADA did indeed

authorize disability-based workplace harassment claims and, second, that Flowers's treatment at the hands of her employer satisfied the standard for such.

In contrast to these two cases, Gowesky alleges that she spoke with Rimes after a staff meeting on February 8, 1999 and informed him that she was planning to return to work in May, upon recovery from her second carpal tunnel surgery. In response, Rimes expressed doubt regarding the legality of staffing the emergency room with a hepatitis-C-infected physician. He imposed as return- to-work conditions that she (a) present a full medical release from her physicians, (b) take a refresher course in emergency medicine, and (c) submit to weekly blood samples. n2 He expressed his unwillingness to be treated by a dentist infected with hepatitis C or to allow Gowesky to suture his child. Gowesky also spoke at this time with Dr. Weldon, who allegedly imposed several conditions upon her: She must perform her work as before; she would not present the risk of infection to others; and she must inform patients and hospital staff about her successful treatment for the virus. n3 These are the only specific remarks to which Gowesky refers. n4

It is not difficult to conclude on this slender evidence that no actionable disability-based harassment occurred. The conditions that Rimes and Weldon placed on Gowesky were, given the nature of Gowesky's work, eminently reasonable. Taken as a whole, the conditions amount to three requirements: that she not present the risk of infection to employees and patients, that she be able to reassure employees and patients of her continuing non-infectious status, and that she be fully capable of resuming her duties. Moreover, even if these conditions were "unreasonable," it is unclear that an "unreasonable" return-to-work condition could raise a

genuine material fact issue concerning "harassment." Gowesky has failed to present any authority, and we have located none, for the proposition that an unreasonable condition alone constitutes "harassment" under the ADA or its model, Title VII.

Nor do the alleged hurtful comments meet the high standard set by Flowers. We are not inclined to extend this judicially created harassment action to behavior that occurred when Gowesky was not actually working at Ocean Springs. Both of the cases that Gowesky cites address the question of harassment in the workplace. This is because a harassment claim, to be cognizable, must affect a person's working environment. With the exception of the comments regarding suturing and dentistry allegedly uttered on February 8, 1999 and anything that might have been said (no details are alleged) at the staff meeting of March 22, all of the transactions between Gowesky and her supervisors occurred via telephone or in writing. She never returned to work during this period. Moreover, standing on their own, the quoted supervisors' comments simply do not reach the level of severity or pervasiveness that is required to create a fact issue on a hostile work environment claim. The comments are not nearly insensitive as those in McConathy, much less in Flowers.

The district court did not err in concluding, on summary judgment that Gowesky had failed to establish her prima facie case of disability-based workplace harassment.

C. ADA Employment Discrimination Claim

This being a case brought under the Americans With Disabilities Act where only circumstantial evidence is offered to show the alleged unlawful discrimination, we

apply the McDonnell Douglas, Title VII burden-shifting analysis. Under this framework, a plaintiff must first make a prima facie showing of discrimination by establishing that: (1) He is disabled or is regarded as disabled; (2) he is qualified for the job; (3) he was subjected to an adverse employment action on account of his disability; and (4) he was replaced by or treated less favorably than non-disabled employees. Once the plaintiff makes his prima facie showing, the burden then shifts to the defendant-employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. Once the employer articulates such a reason, the burden then shifts back upon the plaintiff to establish by a preponderance of the evidence that the articulated reason was merely a pretext for unlawful discrimination.

McInnis v. Alamo Community College Dist., 207 F.3d 276, 279-80 (5th Cir. 2000) (citations and footnotes omitted).

Considering here only the third element of her prima facie case, we conclude that the district court properly granted summary judgment to defendant Singing River on this claim. Because Gowesky failed – critically – to demonstrate that she suffered a disability-based adverse employment action, it is unnecessary to discuss the other elements. Gowesky alleges that Singing River failed to offer her an interim contract for the period between the expiration of her contract on August 28 and the transfer of the emergency room staffing to ERG. This deed did not constitute an adverse employment action. Singing River demonstrated to the district court that its decision not to extend Gowesky an interim contract on October 1, 1999 was a product, not of any alleged discrimination, but, rather, of her repeated failures to return to work. On at least two occasions,

Weldon placed Gowesky on the emergency room work schedule (with start dates, respectively, of June 1 and then August 1), only to receive last-minute telephone calls (May 31) or attorney-drafted correspondence (July 29) indicating that she would not, in fact, abide by her previous commitments. In light of the fact – uncontroverted by Gowesky – that all emergency room employees at work on October 1 received interim contracts, her assertions of discrimination wither away. Singing River asserted, without dispute by Gowesky, that if she had ever again appeared for work, she, too, would have received a contract.

IV. CONCLUSION

This court does not doubt that Dr. Gowesky has suffered greatly since her accidental infection in February 1997. The discomforts occasioned by chemotherapy, surgery, and several years of involuntary unemployment could only have been aggravated by her supervisors' apparent lack of eagerness to take advantage of her likely considerable talents. This must be especially grating in light of the selfless manner in which her infection occurred.

Gowesky must recognize, nonetheless, that not all suffering – no matter how great, no matter how unmerited – gives rise to a compensable legal action. To obtain the right to present his case to a jury, a plaintiff must, at minimum, adduce evidence upon which a rational jury could, as a matter of law, find in his favor. As much as this court admires Gowesky's work and pities her suffering, she has, alas, failed to present such evidence. Accordingly, this court affirms the district court's grant of summary judgment to defendant Singing River.

AFFIRMED.

Footnotes

n1 "McConathy states that when she approached [her employer] regarding the additional surgery, he became angry, and told her that she 'better get well this time,' and that he would 'no longer tolerate her health problems.'" Id. at 560.

n2 This requirement was subsequently withdrawn. Gowesky agreed to the first two conditions.

n3 The hospital disputes that these statements were made, but we assume to the contrary for purposes of summary judgment.

n4 Nevertheless, she asserts, without quotation or paraphrase of their exact comments, that these two men continued to engage in harassing and offensive conduct over the next four months. Gowesky did stipulate at oral argument that later comments, though offensive, did not match Mr. Rimes's statements on February 8, 1999. "Mr. Rimes only made his most offensive comments early on, when Dr. Gowesky came to him and said 'I'm ready to go back to work.'" Their comments "caused Gowesky to question her own self-image and resulted in her seeking and receiving extensive psychological and psychiatric counseling." It is impossible to evaluate whether and to what extent any later statements by these men could have amounted to actionable harassment without any hint as to what they said.

CIVIL ACTION NO. I:00cv246GR

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

BRENDA A. GOWESKY, M.D.,
Plaintiff,

versus

SINGING RIVER HOSPITAL SYSTEM, d/b/a OCEAN SPRINGS HOSPITAL,
Defendant.

March 14, 2002, Filed

MEMORANDUM OPINION

This matter comes before the Court on the motions of the defendant. Singing River Hospital System, d/b/a Ocean Springs Hospital [hospital], for summary judgment [47-1 , 60-1], pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court has duly considered the record in this action, in addition to the briefs of counsel, and being fully advised in the premises, concludes as follows.

Statement of Facts

Plaintiff Brenda Gowesky, M.D., filed her original complaint on June 9, 2000, alleging that the hospital discriminated against her because of her gender and disability. (Compl., p. 5.) Her claims are brought under 42 U.S.C. § 2000e, et seq., Title VII of the Civil Rights Act of 1964; Title I of the Civil Rights Act of 1991; and 42 U.S.C. § 12101, et seq. (Id.) She claims actual and

punitive damages, along with attorneys fees, expenses and costs. (Id.)

On February 26, 1997, Gowesky was cut by a scalpel while performing a procedure, and received a positive test result for hepatitis C on March 19, 1997. (Def.'s Summ. J. Mot., Exh. B, pp. 31 -36.) She informed Dwight Rimes, administrator of the hospital, that she tested positive for hepatitis C on March 20, 1997. (Id., p. 36.) She continued to work at the hospital after receiving the results of the test, and started a treatment with Interferon. (Id., pp. 24, 37, 41.) She later advised Dr. John Weldon, director of the emergency room department, that she would not be able to continue working in the emergency department because of her low white blood count. (Id., pp. 43-4.) She was taken off the schedule, placed on the hospital's 90-day salary continuation program, and later placed on workers' compensation. (Id., pp. 45-6.) On July 24, 1998, Gowesky, applied for a continuation of medical staff privileges at the hospital. (Id., Exh. C.) The hospital extended her staff privileges for two years. (Id., Exh. B, p. 63.)

Gowesky claims that she sustained an on-the-job injury which resulted in her contracting hepatitis C so that she could not perform her duties as an emergency room physician. (Pl.'s Resp., p. 3; Exh. H, pp. 14-16.) Following a staff meeting held February 8. 1999, Gowesky told Rimes that she was able to return to work. (Id., Exh. B, p. 71.) Rimes allegedly told Gowesky that he did not think she would be allowed to work in the emergency room with hepatitis C, and that he would have to check with the hospital attorneys to see whether she would be allowed to return to her former position. (Id., pp. 71, 79.) Rimes also stated that Gowesky must undergo weekly blood draws. (Id., p 71.) In addition she was informed

that she would need a doctor's release and to take a refresher course in emergency medicine. (Id., pp. 69-70.)

Gowesky wrote to Rimes on March 26, 1999, which provided as follows:

In February 1999, I informed you and Dr. John Weldon, Director of Emergency Services, OSH., of my desire to resume my employment in the OSH Emergency Room in May I 999. Prior to resuming my clinical practice, I agreed to your requirements that (a) I attend an advanced trauma life support course in a continuing medical education conference; and (b) I provide with a letter from Dr. Schiff to confirm my fitness to return to work.

On Monday, March 22, 1 999, an OSH Emergency Medicine Department monthly meeting was held in the hospital library. At that time, Dr. Weldon gave me my work schedule for June through August 1999; it noted the shifts I was scheduled to work in the emergency room at that time period. At the department meeting, I reminded Dr. Weldon that prior to my return to work, I needed to undergo surgery on my hands to correct my bilateral carpel tunnel syndrome; I discussed my need for surgery with Dr. Weldon in February 1999. Furthermore, I told Dr. Weldon, that barring any complications from my hand surgeries - I plan to resume my full time work schedule in June 1999 . . . .

(Id., Exh. D.)

Gowesky was free of the hepatitis C virus in March 1999. and had the carpel tunnel surgeries on March 23, 1999, and April 19, 1999, respectively. (Id., Exh. B, pp. 76-7, 92.) On May 21, 1999, a memo was forwarded to all emergency room physicians informing them of the

cancellation of their employment agreements effective in 90 days. (Id., Exh. F.) Emergency Room Group, Ltd. [ERG], would be supplying emergency room physicians to the hospital under a contract. (Id.) Gowesky was offered employment with ERG when its contract with the hospital was implemented. (Id, Exh. F.) She was placed on the schedule as of August 1, 1999. (Id., Exh. B, p. 130.) She was unable to return to work at that time, due to a reactivation of the hepatitis C virus. (Id., Exh. G.)

On October 1, 1999, the emergency room physicians provided services to the hospital as independent contractors. (Id., Exhs. H, pp. 5 51-2; I) According to Rimes, Gowesky's position was held for her during the time she was out of work. (Id., Exh. H, p. 71.) Gowesky has since been employed as an emergency room physician at Gulf Coast Medical Center in Biloxi, Mississippi, as of July 1, 2000. (Id., Exh, A, No. 22.)

Weldon testified that he was not aware of any hospital guidelines regarding a physician working with an infectious disease. (Id., Exh. H, pp. 18-22.) He admitted having limited knowledge of hepatitis C and was unaware of a need to require a weekly blood test to allow Gowesky to perform as an emergency room physician. (Id., p. 41.)

Rimes stated he had no experience with hepatitis C and was unaware of any guidelines regarding the return of an employee who had been gone from work because of illness. (Id., Exh. B, pp. 33, 76.) Gowesky testified that Rimes and Weldon harassed her because she wanted to return to work. (Id., p. 105.) She asserts that she suffered severe emotional distress as a result of the requirements that were placed on her as a condition of returning to work. (Id., p. 227.)

The hospital asserts that Gowesky cannot produce competent evidence to establish that the actual reason she was terminated was because of her gender or age. (Id., p. 7.) The hospital contends that a qualification for the position of physician, inpatient physician services was that the physician be a medical doctor or doctor of osteopathy with an internal medicine fellowship, board certified or board eligible." (Def.'s Summ. J. Mot., Exh. J.) Each of the physicians currently employed in the aforementioned position are board certified in internal medicine. (Id.. Exhs. K-M.) Accordingly, the hospital contends that Gowesky was not qualified for the position or physician, inpatient physician services (Id., p. 13) The hospital asserts that even it Gowesky established a prima facie case of discrimination, it had a legitimate nondiscriminatory reason for offering Weldon the position of physician, inpatient physician services because he was board certified in internal medicine while Gowesky was not. (Id., p. 14.)

Gowesky's claim under the American with Disabilities Act [ADA] also cannot survive the summary judgment motion according to the hospital because she cannot establish that she had an actual or perceived disability. (Id., p. 16.) Gowesky stated that the alleged period of discrimination was from February 1999 until August 1999. (Id., Exh. B, pp. 71-2.) By March 1999 Gowesky was free from hepatitis C and had ended her treatment of the virus. (Id., p. 76.) In July 1999 she was placed on the work schedule to begin on August 1, 1999. (Id., p. 130.) The hospital maintains that Gowesky does not have a record of disability because she demonstrated that she was free from the hepatitis C virus. (Def.'s Summ. J. Mot., p. 19.) The hospital asserts that it was ready and willing to allow Gowesky to return to work. (Id.)

The hospital asserts that Gowesky chose not to return to work, so that she was not subject to an adverse employment action because of her alleged disability. (Id., p. 20.) The hospital asserts that the reason she was not offered a position at the hospital was because she never informed anyone at the hospital that she was ready and willing to return to work. (Id., p. 22.) In fact, Gowesky wrote to the hospital stating that she would not report to work on August 1, 1999. (Id., Exit G.)

Gowesky argues that she was ready to return to work on February 8, 1999, and was prevented from doing so because the hospital perceived her as disabled due to the hepatitis C infection and its impact or. her abilities to perform her duties as an emergency room physician. (Pl.'s Resp.. p. 7.) She contends this perception colored her subsequent interactions with Rimes and Weldon following February 8, and resulted in the failure to be offered an interim professional services agreement from August 1, 1999, until February 2, 2000. (Id.) She contends that she was prevented from returning to work by the hospitals harassing conduct. (Id., p. 8.) She contends that Rimes made certain comments about his alleged fear of being treated by a physician with hepatitis C and that Weldon told her she would have to inform her co-workers that she had been treated and was clear of the infection. (Id., p. 9.)

She claims the hospital erected barriers to prevent her from returning to work by requiring her to submit a medical release, take weekly blood tests and refresher courses. (Id.)

She claims that she was subjected to unwelcomed harassment based on her disability which affected a term or condition of her employment and the hospital failed to take prompt remedial action to rectify the

situation. (Id., p. 1 0.) She further asserts that she was a victim of gender discrimination

Gowesky has not established her prima facie case of discrimination, according to the hospital. (Summ. J. Mot., p. 12.) She was not qualified for the position of a physician in the inpatient physician services department because she was not board certified in internal medicine. (Id., p. 13.) The hospital asserts that Gowesky conceded there was no genuine issue of material fact related to her claim under Title VII because she stated that other female physicians were offered the position she sought, and that the hospital's alleged discrimination toward her was based more on a perception that she was disabled due to the hepatitis C infection. (Def.'s Supp Summ. J. Mot., p. 1.)

The hospital contends that in the event Gowesky has established her prima facie case, the employment action was taken for a legitimate nondiscriminatory reason. (Id.) Gowesky was not qualified for the position because she was not board certified in internal medicine and Weldon was certified which was the reason the hospital retained Weldon. (Id., p. 14.)

Gowesky's ADA claim is based on alleged harassment by the hospital in light of her hepatitis C infection, according to the hospital. (Id.) In addition, the hospital maintains that Gowesky was not disabled during February 1999 and August 1999 because she had planned on returning to work on February 8, 1999. (Id., Exh. B, pp. 7 1-72.)

The hospital maintains that she does not have a history of a disability because she was free from the hepatitis C virus during the February to August time period. (Id., p. 19.) She was not regarded as disabled by the hospital

because the hospital was willing to allow Gowesky to return to work, however, she chose to postpone her availability. (Id.)

The hospital contends that Gowesky could not perform the essential functions of an emergency room physician. (Id., p. 20.) In addition, the hospital asserts that it took no adverse employment action against her, and that she had chosen not to return to work as scheduled on August 1, 1999. (Id.)

Gowesky filed her charge of discrimination with the Equal Employment Opportunity Commission [EEOC] and was issued a right to sue letter on March 14, 2000. (Compl., p. 3.)

The EEOC found insufficient evidence to establish a violation by the hospital after investigating this charge. (Id.)

Standard of Review

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56(c). All disputed facts are resolved in favor of the party opposing the summary judgment. PYCA Indus. v. Harrison County Waste Water Management Dist., 177 F.3d 351, 360 (5th Cir. 1999). The nonmoving party may not rely upon mere allegations or denials within the pleadings, but must come forward with specific facts showing the presence of a genuine issue for trial. Exxon Corp. v. Burglin, 4 F.3d 1294, 1297 (5th Cir. 1993).

Discussion

Jurisdiction is vested in this Court pursuant Title VII and the ADA. (Compl., p. 1.)

I. Title VII Claims

Congress purpose in adopting Title VII was to 'assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified j ob environments to the disadvantage of minority citizens." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). Gowesky bears the initial burden of establishing by a preponderance of evidence her prima facie case under Title VII. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984); Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1047 (5th Cir. 1996). To establish a prima facie case of discrimination. Gowesky must show the following: (1) she is a member of a protected class (female); (2) was qualified for the position; (3) was subjected to an adverse employment action; and (4) that the hospital replaced her with a similarly qualified employee outside the protected group or that she was otherwise discharged because of her sex. See Ward v. Bechtel Corp. 102 F.3d 199, 202 (5th Cir. 1997).

The prima facie case, once established raises a presumption of discrimination, which the defendant must rebut by articulating a legitimate, nondiscriminatory reason for its actions. Sreeram v. Louisiana State Univ., 188 F.3d 314, 318 (5th Cir. 1999); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 525 (1993). This burden involves "no credibility assessment." St. Mary's, 509 U.S. at 509. If the defendant satisfies this burden, the inference of discrimination raised by the prima facie case drops from the case and the plaintiff must prove that the reason is merely a pretext for discrimination and must create a reasonable inference

that her sex was a determinative factor in her termination. Krystek v. University of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999). If she cannot meet this burden, summary judgment is appropriately granted.

Gowesky must show that her gender played an actual role in the employer's decision-making process and had a "determinative influence on the outcome." Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc) (ADEA case). An employee's sincere subjective belief of discrimination cannot provide a plaintiffs sole support for judicial relief Portis v. First Nat. Bank of New Albany, Miss., 34 F.3d 325, 329 (5th Cir. 1994) as amended on denial of reh'g (Nov. 10, 1994); see Nichols v. Loral Vought Sys., 81 F.3d 38, 42 (5th Cir. 1996)

There is no question that Gowesky is a member of the protected classes and that she was adversely affected by not being rehired. Gowesky's proof is severely lacking regarding the fourth prong, as she has not presented evidence that she was terminated due to her gender. The hospital has shown that she was scheduled to return to work in August 1999, and she was unable to return at that time. In addition, other female physicians were offered the position sought by Gowesky during that time frame. (Def.'s Summ. J. Mot., Exhs. B, pp. 130, 148, 94; D; H. pp. 51-2; K.) She admitted that she believed that the reason she was not offered a position was connected more to her hepatitis C infection than because of her gender. (Pl.'s Resp., p. 11 .) Gowesky brought forward no evidence, other than her subjective beliefs, that her gender had anything to do with the ultimate decision to regarding her return to work.

Although an employee may disagree with an employer's decisions the Court is not in the position to "second guess" those decisions without evidence that an

individual's gender was a determining factor in the result. See Bienkowski v. American Airlines, Inc., 851 F.2d 1503 (5th Cir. 1988). To reiterate, an individual's subjective belief that she suffered an adverse employment decision due to her gender; without more, is not enough to establish that there were discriminatory reasons for the decision. See Ray v Tandem Computers, Inc., 63 F.3d 429, 435 (5th Cir. 1995) (age and sex discrimination claims). The Court concludes that the defendant is entitled to summary judgment on Gowesky's gender discrimination claim.

II. Gowesky's ADA Claim

The ADA makes the following provision: "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment 42 U.S.C. § 121 12(a). To establish her ADA claim Gowesky must show she is: (I) a disabled person within the meaning of the ADA; (2) is qualified to perform the essential functions of her job; (3) that the hospital made an adverse employment decision because of her disability; and (4) she was replaced by a non-disabled person or was treated less favorably than non-disabled employees. 42 USC. § 121 12: Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1050 (5th Cir. 1998); Allen v Rapides Parish Sch. Bd., 204 F.3d 6 S. 623 n.3 (5th Cir. 2000). The ADA defines the term qualified individual with a disability' as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 USC. § 12111(8). The definition of a disability includes: "(A) a physical or

mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment. 42 U.S.C. § 12102(2); Ivy v. Jones, 192 F3d 5 14, 5 1 6 (5th Cit 1999) The definition is basically the same as that contained in the Rehabilitation Act of 1973, 29 U.S.C. § 706(3)(B). See Chandler v. City of Dallas, 2 F.3d 1385, 1391 (5th Cir. 1993), reh'g denied 9 F.3d 105, & cert. denied 511 U.S. 1011 (1994). Under the ADA, the impairment must "substantially limit" one of more of an individual's life activities to qualify as a disability. 42 U.S.C. § 12102(2)(A); 20 C.F.R. § 1630.2(j).

"Discrimination" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . ." 42 U.S.C § 12 12(b)95)(A). "Major life activities" include the ability to care for yourself, perform manual tasks, walk, talk, see, hear, breathe, and work. 45 C.F.R. § 84.3 (j)(2)(ii). Whether an impairment substantially limits a plaintiffs employment potential depends on the number of jobs from which she is disqualified, the geographic area to which she has reasonable access, and her employment qualifications. Hileman v. City of Dallas, Tx., 115 F.3d 352, 354 (5th Cir. 1997). Furthermore, an impairment that affects a person's ability to perform a narrow range of jobs, or one particular job does not substantially limit one or more major life activities. Chandler, 2 F.3d at 1392. The plaintiff must show a genuine issue of material fact regarding each element of his claim to avert summary judgment on that claim. FED. R. Civ. P. 56(c). Additionally, plaintiff must provide more than

speculation and conjecture to defeat summary judgment Fed. R. Civ. P. 56(e).

Gowesky further clarifies her position by asserting that she was unable to return to work because of the hospital's harassing conduct. (Pl.'s Resp., p. 8.) A claim of disability based harassment requires that the plaintiff prove the following: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on her disability or disabilities; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) the employer knew or should have know of the harassment and failed to take prompt remedial action. McConathy v. Dr. Pepper/Seven Up Corp., 13 1 F.3d 558, 563 (5th Cir. 1998). The disability-based harassment must be "sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment." McConathy, 13 1 F.3d at 561 To determine if a work environment is abusive, consideration must be given to the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or merely an offensive utterance, and whether it unreasonably interferes with an employee's work performance. Shepherd v. Comptroller of Public Accounts, 168 F.3d 371, 874 (5th Cir. 1999), cert. denied 528 U.S. 963. Gowesky contends that her supervisors subjected her to harassment as evidenced by Rimes' comment that he would be afraid to have an ER physician treat him if that person had hepatitis C and Weldon' s requirement that she inform people that she had treated for hepatitis C and his concerns about the infectious process. (Pl. 's Resp., p. 9.) She contends that the hospital established barriers to her ability to return to work by requiring a medical release, weekly blood tests to monitor her condition and making her take refresher course work.

(Id.) Gowesky asserts that the affect these comments and conduct had on her creates an issue of fact about whether the work environment was hostile. (Id., pp. 10-11.)

Gowesky conceded that Rimes had withdrawn the requirement that she submit to weekly blood tests as a condition of returning to work. (Def's Summ. J. Mot., Exh. B, pp. 77-8.) The medical release was required for all employees returning from medical leave. (Id., Exh. H. p. 66.) The refresher course was a reasonable expectation according to the hospital by reason that Gowesky had not practiced medicine in almost two years. (Id., Exh., M, p. 25.) The hospital further asserts that any comments made by Rimes about his alleged fears of treatment from a physician who had contracted hepatitis C are stray remarks, which did not alter the conditions of her employment because she was placed on the schedule to return to work after the remarks were made. (Id., Exh. B, pp. 94-5, I0I-2.)

Gowesky testified to humiliation and emotional distress suffered as a result of the conditions of re-employment placed on her and Rimes' remarks about his perception of being treated by a physician with hepatitis C. (Gowesky Depo., pp. 104-5, 227.) She contends that this perception was the reason she was not offered a position with the hospital. (Pl.'s Resp., p. 7.)

In order to prevail on her claim that the work environment was abusive, Gowesky must show the environment was one which "a reasonable person would find hostile or abusive." Indest Freeman Decorating, Inc., 164 F.3d 258, 263 n.8 (5th Cir. 1999). The evidence upon which Gowesky bases her claim does not establish that the environment was hostile or abusive. The Court Finds that the conditions which she was required to

meet were not unreasonable. The hospital established that any employee would be required to provide a medical release following an extended medical absence. The requirement that Gowesky take a refresher course in emergency room procedures following her nearly two year absence from the field could only serve to benefit her, both in preparing to return to work after a long absence and in familiarizing herself with any changes in the field.

Rimes' comments about his concerns about being treated by a physician who had hepatitis C did not ultimately change any offer to reemploy Gowesky by the hospital, and although they may have caused Gowesky distress, do not rise to the level of creating a hostile work environment. See Shepherd, 1 68 F.3d at 871; McConathy, 131 F.3d at 558.

Furthermore, Gowesky has also not established that the hospital perceived her as disabled. A person is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting only because of the attitudes of others towards such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantial limiting impairment. Bridges v. City of Bossier, 92 F.3d 329, 332 (5th Cir. 1996) ((citing Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 727-28 n.l9 (5th Cir. 1995)). Gowesky was offered the opportunity to return to work at the hospital. Ray v. Glidden Co.. 85 F.3d 227. 230 (5th Cir. 1996). The hospital established that Gowesky was able to work without but Gowesky postponed that decision for unrelated surgery (Def's Summ. J. Mot., Exhs. D, G and H, p. 71) The Court finds that Gowesky

has failed to establish that the hospital perceived her as disabled. Based on this evidence, the Court therefore, concludes that summary judgment should be granted on Gowesky' s claims under the ADA. Robinson v Global Marine Drilling Co. 101 F.3d 35, 37 (5th Cir. 1996).

III. State Law Claims

Defendant's supplemental motion for summary judgment, filed in October 2001, raised the issue of the propriety of maintaining any state law claims. (Ct. R., Doc. 60, p. 2.) Gowesky asserted that as a result of the hospital's alleged discrimination, she suffered "extreme emotional distress and anguish" and claimed that this conduct was intentional. (Compl., p. 5.) The hospital maintains that Gowesky has not established the requisite elements for a claim of intentional infliction of emotional distress. (Def.'s Supp. Summ. J. Mot., p. 4.) The hospital indicates that Gowesky has two state law claims pending; one in the Circuit Court of Jackson County, Mississippi, and one with the Mississippi Workers' Compensation Commission. (Id., p. 4 n.1.)

The hospital also contends that a claim for intentional infliction of emotional distress is generally not viable in an employment dispute. (Id., p. 5.) In the event Gowesky is asserting a claim for employment discrimination under Mississippi law, the hospital contends that this claim is not viable under Mississippi law, because it is an employment-at-will state. (Id.) Finally, the hospital maintains that if Gowesky had a viable state law claim, it would be barred under Mississippi Code Annotated § 11-46-9. (Id.) Community hospitals fall within these provisions. Miss. CODE ANN. § 11-46-1(I). Thus, according to the hospital, it and its employees are immune from suits arising within the course and scope of their employment. (Def.'s Supp. Summ. J. Mot., p. 7.)

The hiring and supervising of employees involves a discretionary act, which the hospital argues would farther insulate it from any liability. (Id., p. 8.) The decision to allow an employee to return to the work place is discretionary according to the hospital, thereby absolving it from liability in this case. (Id.) Should Gowesky have viable state law claims, the hospital urges that the Court dismiss these rather than retain supplemental jurisdiction over them, should Gowesky's federal claims be dismissed. (Id.)

Recovery for a claim of intentional infliction of emotional distress can be had when a plaintiff shows "there is something about the defendant's conduct which evokes outrage or revulsion, done intentionally . . . the result being reasonably foreseeable . . . even though there has been no physical injury." Sears, Roebuck & Co. v. Devers, 405 So.2d 898, 902 (Miss. 1981) "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities." Lawson v. Heidelberg Eastern, 872 F. Supp. 335, 338 (N.D. Miss. 1995), aff'd70 F.3d 1269. A defendant's conduct must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Pegues v. Emerson Elec. Co., 913 F. Supp. 976, 982 (N.D. Miss. 1996); Morrison v. Means, 680 So.2d 803, 805-6 (Miss. 1996). Employment disputes including termination generally do not fall within this territory. Prunty v. Arkansas Freightways, Inc., 16 F.3d 649, 654-5, reh'g & reh'g en banc denied 21 F.3d 1110 (5th Cir. 1994); Brown v. Inter-City Fed Bank for Savings, 738 So.2d 262, 265 (Miss. 1999). There must be much more involved than a disagreement in the workplace to support a claim for intentional infliction of emotional

distress. Brown v. Inter-City Fed. Bank, 738 So.2d 262, 264 (Miss. 1999), reh'g denied & cert. denied (1999).

A plaintiffs claims for work related mental distress can be compensable under the Workers' Compensation Act. See Fought v. Stuart C. Irby Co., 523 So.2d 314, 317-18 (Miss. 1988); Smith v. City of Jackson, 792 So.2d 335, 337 (Miss. App. 2001). The hospital has provided information that Gowesky has filed suit in state court and with the Workers Compensation commission based on claims relating to her employment with the hospital. A district court may exercise jurisdiction over claims that form part of the same case or controversy as the claims which the court has original jurisdiction. 28 U.S.C. § 1367(a). The Court may also decline to exercise jurisdiction over a claim if the district court has dismissed all claims over -which it had original jurisdiction.' 28 U.S.C. § 1367(c)(3); see Rhyne v. Henderson County, 973 F.2d 386, 395 (5th Cir. 1992). The Court will decline to exercise supplemental jurisdiction over Gowesky's state law claims, to avoid conflicting rulings on these issues. See Noble v. White, 996 F.2d 797, 799 (5th Cir. 1993). The Court concludes that any claims brought by Gowesky under state law should be dismissed, without prejudice.

Conclusion

Based on the foregoing, the Court finds that the hospital's motions for summary judgment [47-1] on Gowesky's claims under Title VII and the ADA should be granted. The Court further finds that the hospital's supplemental motion for summary judgment [60-1] on Gowesky's state law claims should be denied, and that the state law claims should be dismissed, without prejudice, from this suit. A separate summary judgment in conformity with and incorporating by reference the

above Memorandum Opinion shall issue this date. Each party shall bear their respective costs.

THIS 13th day of March, A.D., 2002.
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 9 - 2003
OFFICE OF THE CLERK

No. 02-1647

IN THE

Supreme Court of the United States

BRENDA A. GOWESKY, M.D.,

Petitioner,

v.

SINGING RIVER HOSPITAL SYSTEM,
d/b/a OCEAN SPRINGS HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Singing River Hospital System is a political subdivision of the State of Mississippi.

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REASONS FOR DENYING THE PETITION

This action was initially brought by the Petitioner in the United States District Court, Southern District of Mississippi, for alleged violations of Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act (ADA) and pendent state law claims. The Respondent's Motion for Summary Judgment was granted on March 14, 2002, and Petitioner appealed to the Fifth Circuit Court of Appeals. The appeal to the Fifth Circuit related solely to the ADA. On February 6, 2003, after oral argument, the Fifth Circuit affirmed the ruling of the District Court. No Motion to Reconsider or Petition for Hearing En Banc was filed by Petitioner.

The questions presented by the Petitioner are (1) whether it is "eminently reasonable" as a matter of federal law, to require an individual covered by the Americans With Disabilities Act to involuntarily disclose private medical information as a condition of employment when such information poses no significant health risk; (2) does the Court of Appeals' decision that it was "eminently reasonable" to require the Petitioner to disclose private medical information as a condition of continued employment contravene clearly established and fundamental rights of privacy under the circumstances, and, thus, constitute a discriminatory practice under the Americans With Disabilities Act; and (3) did the Petitioner raise a genuine issue of triable fact as to whether the Respondent engaged in a discriminatory practice under the Americans With Disabilities Act. According to Petitioner, the Fifth Circuit's opinion, if allowed to stand, would result in precedent that an employer, covered by the ADA, can demand, as a condition of employment or continued employment, that an individual disclose private information about a medical condition that has not been shown to pose a significant health risk to others.

Neither the Fifth Circuit's actual ruling, nor the record below, raise the questions presented by the Petitioner. Initially, the Fifth Circuit found as a matter of law that the Petitioner could not establish that she was regarded as disabled under the ADA and therefore any claims under the ADA for disability-based workplace harassment and/or employment discrimination fail because this threshold element was not met. (App. at 7a). The other elements of Petitioner's claims for disability-based workplace harassment and employment discrimination were addressed by the Fifth Circuit solely "[f]or the purposes of a complete analysis" . . . "assuming for the sake of argument that Gowesky could have been regarded as disabled. . . ." (App. at 7a-8a). It is these other elements which form the basis of the Petition. In making their analysis, the Fifth Circuit clearly determined, both factually and legally, that the purported "conditions of employment" form the basis of the Petitioner's workplace harassment claim under the ADA and not, as argued in the Petition, an employment discrimination claim separate from the harassment claim. Therefore, Petitioner's claim that the Fifth Circuit has created precedent that an employer can demand as a condition of employment that an individual disclose private information about a medical condition is erroneous because neither the Fifth Circuit, nor the District Court, made the analysis or reached the conclusions claimed by the Petitioner. The analysis regarding the purported conditions of employment were solely related to the question of whether those purported conditions constituted harassment under the ADA and neither court below addressed the issue as phrased by the Petitioner. To claim otherwise is a misleading statement not supported by the record. Additionally, in their analysis the Fifth Circuit did not undertake a review of the purported medical/scientific evidence submitted by the Petitioner herein because this information was not part of the record submitted to the District Court or on appeal to the Fifth Circuit.

In addition, the ruling by the Fifth Circuit is consistent with the legal principles of Rule 56 of the Federal Rules of Civil Procedure regarding summary judgment.

Lastly, the ruling by the Fifth Circuit does not have far-reaching implications as it relates to the ADA.

The Fifth Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On February 26, 1997, Dr. Brenda Gowesky (hereinafter, "Gowesky" or "Petitioner"), while employed as an emergency room physician at the Ocean Springs Hospital, a member of the Singing River Hospital System (hereinafter, "SRHS"), was cut by a scalpel while performing a procedure. On March 19, 1997, Gowesky received a positive test for the Hepatitis C virus. On March 20, 1997, Gowesky informed Dwight Rimes, Administrator of the Ocean Springs Hospital, that she received a positive test for Hepatitis C. After testing positive for Hepatitis C, Gowesky continued to work at the hospital. (Deposition of Gowesky, R. 162 and 167). As a result of the virus, Gowesky started a treatment regimen involving the drug Interferon. Because of the side effects of the drug therapy, Gowesky advised Dr. John Weldon, the Director of Emergency Medicine at Ocean Springs Hospital, that she could not work in the emergency department. (Deposition of Gowesky, R. 167). Pursuant to the request by Gowesky, she was taken off the emergency room schedule and began receiving a variety of benefits. (Deposition of Gowesky, R. 168).

On July 24, 1998, Gowesky applied for a continuation of medical staff privileges at the Ocean Springs Hospital. (Letter dated July 24, 1998, R. 214). In this letter, Gowesky indicated that she was "hopeful by 1999 my infection with the Hepatitis C virus will be in remission or completely cleared; this will allow me to discontinue my medications and return to work." In response to the application, the SRHS extended the staff privileges of Gowesky an additional two years. (Deposition of Gowesky, R. 172). On February 8, 1999, Gowesky contends that she spoke to Dwight Rimes about returning to work and that Dwight Rimes indicated that in order to return to work she would need a release from her doctors and would need to take a refresher course in emergency medicine. (Deposition of Gowesky, R. 174). On March 26, 1999, Gowesky wrote Dwight Rimes, confirming in part that:

> . . . In February 1999, I informed you and Dr. John Weldon, Director of Emergency Services, OSH, of my desire to resume my employment in the OSH Emergency Room in May 1999. Prior to resuming my clinical practice, I agreed to your requirements that (a) I attend an advanced trauma life support course in a continuing medical education conference; and (b) I provide you with a letter from Dr. Schiff to confirm my fitness to return to work.
>
> On Monday, March 22, 1999, an OSH Emergency Medicine Department monthly meeting was held in the hospital library. At that time, Dr. Weldon gave me my work schedule for June through August 1999; it noted the shifts I was scheduled to work in the emergency room at that time period. At the department meeting, I reminded Dr. Weldon that prior to my return to work, I needed to undergo surgery

> on my hands to correct my bilateral carpal tunnel syndrome; I discussed my need for surgery with Dr. Weldon in February 1999. Furthermore, I told Dr. Weldon, that barring any complications from my hand surgeries - I plan to resume my full time work schedule in June 1999 . . .

(Letter dated March 26, 1999, R. 215-216).

In March 1999, Gowesky was free of the Hepatitis C virus. (Deposition of Gowesky, R. 175). Gowesky had carpal tunnel surgery on her right hand on March 23, 1999, and had carpal tunnel surgery on her left hand on April 19, 1999. Despite being placed on the work schedule for June through August 1999, Gowesky was unable to report to work because of her carpal tunnel surgery. (R. 183).

On May 31, 1999, a memo was forwarded to all emergency room physicians at the Ocean Springs Hospital from Dwight Rimes informing them of the cancellation of their employment agreements effective in 90 days. This was done because the SRHS was no longer going to employ physicians in the emergency department, but rather contract with the Emergency Room Group, Ltd., who would employ their own physicians. On June 17, 1999, Gowesky wrote Dwight Rimes acknowledging the May 31, 1999 Memorandum, acknowledging that effective September 1, 1999, the Emergency Room Group, Ltd., will begin staffing the Ocean Springs Hospital Emergency Room with physicians, and advising that she had employment with the new group. (Letter dated June 17, 1999, R. 218-219).

In July 1999, Gowesky contacted Dr. John Weldon and she was placed on the work schedule beginning August 1, 1999. (Deposition of Gowesky, R. 189).

On July 29, 1999, Gowesky, by and through her attorney, advised the attorney for the SRHS handling her workers' compensation claim, that she would not return to work on August 1, 1999. This letter states in part:

> . . . this will confirm that you will advise the Ocean Springs Hospital that Dr. Gowesky will be unable to return to work on August 1, 1999. It was my understanding that some months ago Dr. Gowesky was placed on the ER schedule for the month of August. This was at a time prior to the reactivation of the virus, the request for desensitization therapy, and the issues surrounding her carpal tunnel releases. I requested that you advise the appropriate hospital staff that arrangements needed to be made to fill Dr. Gowesky's slot.

(Letter dated July 29, 1999, R. 220).

In fact, Gowesky did not report to work on August 1, 1999. (Deposition of Gowesky, R. 193).

Subsequent to Gowesky advising that she would not report to work on August 1, 1999, the SRHS never received any indication that Gowesky was ready to return to work at a later date. (Deposition of Gowesky, R. 184).

The contract with the Emergency Room Group, Ltd., anticipated in September 1999, did not occur until February 2000. As a result of the prior cancellation of the Emergency Room Physician contracts, the Ocean Springs Hospital did not have any written employment agreements with the emergency physicians to staff its emergency room as of September 1, 1999. From September 1, 1999, through October 1, 1999, the emergency

department remained staffed with physicians absent any specific employment agreements. On October 1, 1999, Professional Service Agreements were entered into between the SRHS and six former emergency room physician employees at the Ocean Springs Hospital, wherein they became independent contractors for the purpose of providing emergency medicine services. (Deposition of Rimes, R. 233; Professional Service Agreements, Exhibit "I" to Motion for Summary Judgment, filed under seal pursuant to Protective Order). Had Gowesky indicated she was ready to return to work subsequent to August 1, 1999, she would have been extended an agreement. (Deposition of Rimes, R. 235).

During the entire time Gowesky was out of work, her job was kept open for her. (Deposition of Rimes, R. 238).

Since July 1, 2000, Gowesky has been employed, without restrictions, as an emergency room physician at Gulf Coast Medical Center in Biloxi, Mississippi. (Plaintiff's Response to Interrogatory Number 22, R. 154).

I.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTIONS PRESENTED BY THE PETITION

A. The Petitioner Was Not Regarded As Disabled Under The Americans With Disabilities Act, Therefore All Claims Under The Act Fail

It is undisputed that the Petitioner did not assert that, as a result of her Hepatitis C infection, she was disabled in a conventional sense under the ADA. However, the ADA's

definition of disability does permit suits by those who, although not actually disabled are nonetheless "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C); *Bridges v. City of Bossier*, 92 F.3d 329, 332 (5th Cir. 1996). Throughout this litigation, the Petitioner has alleged that she was regarded as disabled by her supervisors. (App. at 7a).

Accordingly, in order for the Petitioner to recover for a violation of the Americans With Disabilities Act, she must establish that although she has no impairment at all she is regarded by the employer as having a substantially limiting impairment. *McInnis v. Alamo Community College District*, 207 F.3d 276 (5th Cir. 2001).

Both the Fifth Circuit Court of Appeals and the United States District Court found as a matter of law that the Petitioner failed in her threshold burden regarding this critical element.

The Fifth Circuit held:

> Gowesky alleges that, though not disabled under subsection (a), she was "regarded as disabled" by her supervisors under subsection (c). This is evidenced, she argues, by their questions and remarks regarding her ability to return to work in the emergency room.
>
> With her assertion this court cannot agree. At most, the comments cited by Gowesky question her fitness to practice emergency room medicine, a professional calling in which routine exposure to blood and bodily fluids might allow the Hepatitis C virus to spread. The supervisors' remarks, no matter how uninformed, do not suggest Gowesky was otherwise unable to

> work as a doctor in a less-exposed or -exposing environment. The EEOC regulations make plain that an inability to perform one particular job, as opposed to a broad range of jobs, does not constitute an impairment that substantially limits one's ability to work. 29 C.F.R. §1630.2(j)(3)(i). This court has enforced the regulatory distinction. *See*, *Bridges*, 92 F.3d at 332 &n.3; *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726-28 (5th Cir. 1995).
>
> Equally detrimental to her claim is the hospital's point that Gowesky could not have been regarded as disabled by the supervisors because they kept reassigning her to the emergency room schedule. It was Gowesky who repeatedly declined to return to work. She cannot succeed on the "regarded as disabled" element of either claim when her employer never limited her job duties or hindered her return to the full range of duties.
>
> On the basis of this conclusion alone, this court concludes that Gowesky's two claims must fail.

(App. at 7a).

The District Court similarly found:

> . . . Gowesky has also not established that the hospital perceived her as disabled. A person is regarded as having a substantially limiting impairment if the individual (1) has an impairment which is not substantially limiting but which the employer perceives as constituting a substantially limiting impairment; (2) has an impairment which is substantially limiting

> only because of the attitudes of others towards such an impairment; or (3) has no impairment at all but is regarded by the employer as having a substantial limiting impairment. *Bridges v. City of Bossier*, 92 F.3d 329, 332 (5th Cir. 1996) (citing *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 n.19 (5th Cir. 1995)). Gowesky was offered the opportunity to return to work at the hospital. *Ray v. Glidden Co.*, 85 F.3d 227, 230 (5th Cir. 1996). The hospital established that Gowesky was able to work without [sic] but Gowesky postponed that decision for unrelated surgery (Def's Summ. J. Mot., Exhs. D, G and H, p. 71). The Court finds that Gowesky has failed to establish that the hospital perceived her as disabled. Based on this evidence, the court therefore, concludes that summary judgment should be granted on Gowesky's claims under the ADA. *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996).

(App. at 29a, 30a).

The Fifth Circuit clearly found that Gowesky's claims under the Americans With Disabilities Act fail because the Petitioner was not regarded as disabled under the Act. The Fifth Circuit also made clear that its analysis of the other elements of Petitioner's workplace harassment and discrimination claims was done "[f]or the purposes of a complete analysis" . . . "assuming for the sake of argument that Gowesky could have been regarded as disabled. . . ." (App. at 7a, 8a). It is these other elements of Petitioner's ADA claims which form the basis of this Petition and not the threshold issue of whether Petitioner was regarded as disabled. Because the Fifth Circuit determined that the Petitioner was not regarded as disabled under the ADA and therefore unable

to establish the threshold element of her ADA claims, neither the record nor the decision below raise the questions presented by the Petition and review by this Court is unnecessary.

B. The Petitioner's Purported "Conditions Of Employment" Form The Basis Of The Workplace Harassment Claim Only And Do Not Form The Basis Of An Employment Discrimination Claim

The Petitioner, ignoring the Fifth Circuit's finding that she was not regarded as disabled under the ADA, contends that the purported conditions of employment placed upon her by her supervisors establish an employment discrimination claim under the ADA. However, the Fifth Circuit's opinion and the record below clearly indicate that the purported conditions of employment, including any requirement that the Petitioner inform patients and hospital staff about her successful treatment for the Hepatitis C virus, form the basis of the Petitioner's workplace harassment claim under the ADA, only, and do not form the basis of an independent employment discrimination claim.[1]

---

1. Interestingly, the purported disclosure requirement was not set forth as a basis for either Petitioner's workplace harassment claim or employment discrimination claim in Petitioner's deposition or correspondence with the Singing River Hospital System. In her deposition, Petitioner clearly identified the exact treatment she considered harassing: (1) the requirement she obtain a medical release from Dr. Eugene Schiff, a specialist in Miami, Florida, who was treating Gowesky, prior to returning to work; (2) the requirement she attend a refresher/training course on emergency medicine prior to returning to work; (3) an alleged requirement she have weekly blood draws/tests upon her return to work; and (4) alleged comments by Dwight Rimes that he did not think she could work in the emergency room with Hepatitis C and that he would not go to a

(Cont'd)

The Fifth Circuit thoroughly discussed the Petitioner's workplace harassment claim under the standards established in *Flowers v. Southern Regional Physicians Services*, 247 F.3d 229 (5th Cir. 2001). The Court reiterated the standard necessary to succeed on such a claim by finding the Petitioner must demonstrate (1) that she belonged to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of effected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action. *Id.*, at 235-236. In analyzing this claim, the Fifth Circuit discussed the factual allegations set forth by the Petitioner, including the purported condition of employment regarding notification of patients and co-workers:

> Gowesky also spoke at this time with Dr. Weldon, who allegedly imposed several conditions upon her: She must perform her work as before; she would not present the risk of infection to others; and she must inform patients and hospital staff about her successful treatment for the virus.

(Cont'd)

dentist with Hepatitis C or let her suture his child. (Deposition of Gowesky, R. 174). Only two of these items, the medical release and the refresher course, were referenced in the letter forwarded by Petitioner to Dwight Rimes on March 26, 1999, regarding her return to work and the purported conditions of that return. (R. 161-162). There was no mention in the letter about any requirement for weekly blood work and, Petitioner conceded in her deposition that this was not in the letter because Dwight Rimes withdrew that requirement. (Deposition of Gowesky, R. 176).

It is not difficult to conclude on this slender evidence that no actionable disability-based harassment occurred. The conditions that Rimes and Weldon placed on Gowesky were, given the nature of Gowesky's work, eminently reasonable. Taken as a whole, the conditions amount to three requirements: that she not present the risk of infection to employees and patients, that she be able to reassure employees and patients of her continuing non-infectious status, and that she be fully capable of resuming her duties. Moreover, even if these conditions were "unreasonable," it is unclear that an "unreasonable" return-to-work condition could raise a genuine material fact issue concerning "harassment." Gowesky has failed to present any authority, and we have located none, for the proposition that an unreasonable condition alone constitutes "harassment" under the ADA or its model, Title VII.

Nor do the alleged hurtful comments meet the high standard set in *Flowers*. We are not inclined to extend this judicially created harassment action to behavior that occurred when Gowesky was not actually working at Ocean Springs. Both of the cases that Gowesky cites address the question of harassment in the workplace. This is because a harassment claim, to be cognizable, must affect a person's working environment. With the exception of the comments regarding suturing and dentistry allegedly uttered on February 8, 1999 and anything that might have been said (no details are alleged) at the staff meeting of March 22, all of the transactions between Gowesky and her supervisors occurred via telephone or in writing. She never returned to work

> during this period. Moreover, standing on their own, the quoted supervisors' comments simply do not reach the level of severity or pervasiveness that is required to create a fact issue on a hostile work environment claim. The comments are not nearly insensitive as those in *McConathy*, much less in *Flowers*.
>
> The district court did not err in concluding, on summary judgment that Gowesky had failed to establish her prima facie case of disability-based workplace harassment.

(App. at 10a, 11a.)

In contrast, the Petitioner's claim for employment discrimination under the ADA relates to the purported failure of the Singing River Hospital System to offer the Petitioner an interim contract of employment for the period between the expiration of her contract on August 28 and the transfer of the emergency room staffing to the Emergency Room Group, Ltd. (App. at 12a). The Fifth Circuit did not address the purported conditions of employment in analyzing the employment discrimination claim because the purported conditions of employment did not form the basis of the Petitioner's employment discrimination claim. (Gowesky's Response to Interrogatories, No. 8, R. 150).

The District Court and the Fifth Circuit clearly considered the purported statement by Dr. Weldon and concluded that it was: (1) not a condition of employment; (2) not an unreasonable requirement; and (3) if it was unreasonable it did not rise to the level of harassment. It is misleading, if not a false statement, to suggest that the District Court or Fifth Circuit has adopted a rule of disclosure proposed by Petitioner. Petitioner's statement that "the condition unreasonably forced Gowesky to choose

between her livelihood or her privacy" (Petition, page 14) is unsupported by the record and is inconsistent with the claims originally set forth by the Petitioner.

C. The Petitioner Presented No Medical/Scientific Evidence Until This Petition

The Petitioner asserts that the decision by the Fifth Circuit concerning the rights of employees with Hepatitis C conflicts with the reasonable medical judgment of public and private health experts "including the Centers for Disease Control (CDC), the National Institute of Health (NIH), the American Medical Association (AMA), the American College of Emergency Physicians (ACEP), the Society for Healthcare Epidemiology of America (SHEA), and the American College of Surgeons." (Petition, page 5). In making this assertion, the Petitioner sets forth a variety of statistical information regarding Hepatitis C. Importantly, the Petitioner does not cite to any portion of the Fifth Circuit opinion or the District Court opinion wherein this medical/scientific evidence was purportedly discussed because the Petitioner did not present this purported information to either the District Court or on appeal to the Fifth Circuit. Therefore, the Petitioner's assertion that the Fifth Circuit opinion is in conflict with this Court's decisions in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1986) and *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998) is unsupported by the record below and is not a proper subject for this Court's review. It is well-established practice that the Court will "decide cases on the grounds raised and considered in the Court of Appeals and included in the question" on which certiorari was granted. *Bragdon* at 638.

II.

THE ENTRY OF SUMMARY JUDGMENT BY THE DISTRICT COURT AND THE FIFTH CIRCUIT AFFIRMING OF SUMMARY JUDGMENT WERE APPROPRIATE UNDER RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Petitioner discusses at length purported factual inaccuracies and inconsistencies by the courts below in an attempt to establish a deviation from the principals of Rule 56 of the Federal Rules of Civil Procedure. The Fifth Circuit set out the well-established standard for summary judgment and utilized the same in its review of the proceedings:

> We review *de novo* a district court's grant of summary judgment, applying the same standard as the district court. *See*, *Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986). "If the moving party meets the initial burden of showing there is no genuine issue of material fact the burden shifts to the non moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Allen v. Rapides Parish Sch. Bd.*, 204 F.3d 619, 621 (5th Cir. 2000) (internal quotations and citation omitted). Doubts are to be resolved in favor of the

> non-moving party, and any reasonable inferences are to be drawn in favor of that party. *See, Burch v. City of Nacogdoches*, 174 F.3d 615, 619 (5th Cir. 1999).

(App. at 5a).

Despite Petitioner's contentions, it is clear from the opinions of the Fifth Circuit and District Court that a thorough factual analysis of the record was completed and Petitioner's attempt to now supplement the record with unsupported claims in this Petition does nothing to modify the record in the courts below and before this Court. Both the District Court and the Fifth Circuit set forth a detailed factual analysis and considered any factual discrepancies in light of the Petitioner consistent with Rule 56. Applying the facts as presented in the record to the applicable law, the courts below found that summary judgment was appropriate based on the specific claims asserted by Petitioner.

III.

THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS UNDER THE ADA

The Petitioner contends that:

> If allowed to stand, the Court of Appeals' decision results in precedent, at least in the Fifth Circuit, that an employer, covered by the ADA, can demand, as a condition of employment or continued employment, that an individual disclose private information about a medical condition that has not been shown to pose a significant health risk to others.

(Petition, page 9).

In her conclusion, the Petitioner further states:

> Unless the writ is granted in this case, and the decision below vacated, there will exist a legal guideline that conflicts with informed medical judgment.

(Petition, page 20).

As set forth herein, these conclusions by Petitioner are erroneous. The purported conditions of employment, specifically any requirement that the Petitioner inform patients and hospital staff about her successful treatment for the Hepatitis C virus, form the basis of the Petitioner's workplace harassment claim under the ADA, only, and do not form the basis of an independent employment discrimination claim as now contended in the Petition. Neither the Fifth Circuit nor the District Court made the analysis or reached the conclusions claimed by the Petitioner. The analysis regarding the purported conditions of employment were solely related to the question of whether those purported conditions constituted harassment under the ADA and neither court below addressed the issue as phrased by the Petitioner. To claim otherwise is a misleading statement not supported by the record. Both courts below clearly considered the purported disclosure requirement under the parameters of the workplace harassment claim and it is misleading, if not a false statement, to suggest that either court adopt a rule of disclosure as proposed by Petitioner.

The medical/scientific evidence set forth in the Petition was not presented to either the District Court or to the Fifth Circuit and therefore the opinion of the Fifth Circuit does not conflict with "informed medical judgment" as alleged in the Petition.

The Fifth Circuit Court of Appeals, as well as the District Court, found that the Plaintiff was not regarded as disabled under the ADA and therefore the threshold element of all of the ADA claims was not met by Petitioner. Any further discussion regarding the other elements of her ADA claims was done for the stated "purpose of a complete analysis" . . . "assuming for the sake of argument that Gowesky could have been regarded as disabled. . . ." (App. at 7a-8a). The Fifth Circuit ruled, clearly and simply, that the Petitioner was not regarded as disabled under the ADA and this ruling constituted the proper application of the law based on the facts before the Court. This case raises no significant issue of law under the ADA and does not have far-reaching implications.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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